

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

..... Term, 1978

78-626

No.

FRANCIS P. LONG,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Your petitioner, FRANCIS P. LONG, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above-captioned case.

OPINIONS BELOW

The district court's opinion and order dated November 2, 1976, denying the motion for new trial, is reported at 421 F.Supp. 1355 (W.D.Pa. 1976), and is set forth herein at "Appendix A".

The court of appeals' opinion and order dated March 6, 1978, affirming the district court's judgment of conviction, is reported at 574 F.2d 761 (3rd Cir. 1978), and is set forth herein at "Appendix B".

Questions Presented.

The court of appeals' order dated September 14, 1978, denying the petition for rehearing, is not yet reported but is set forth herein at "Appendix C".

JURISDICTION

On March 6, 1978, the court of appeals issued its opinion and order affirming the district court's judgment of conviction. The court of appeals issued an order denying the petition for rehearing on September 14, 1978, and the within petition for a writ of certiorari is being filed within thirty (30) days of said order. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I. Whether the evidence seized pursuant to the search warrant should have been suppressed because the facts set forth in the affidavit do not establish probable cause since those facts were based upon the uncorroborated statements of an unnamed informant whose reliability was not properly established under applicable decisions of this Court?

II. Whether the introduction of evidence of other alleged criminal activity was so unfairly prejudicial as to violate Rule 403 of the Federal Rules of Evidence and deny Petitioner the due process of law?

III. Whether the introduction of hearsay evidence in the form of documents and testimony was so prejudicial as to deny Petitioner the due process of law?

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STATUTE INVOLVED

Rule 403, Federal Rules of Evidence

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

History

Petitioner, Francis P. Long, was named in four counts of an indictment charging him with conspiring to obstruct justice (Count I, 18 U.S.C. §371), corruptly endeavoring to influence a witness before a grand jury (Counts II and III, 18 U.S.C. §§1503 & 2), and providing false testimony to a grand jury (Count IV, 18 U.S.C. §1623).

In the proceedings before the district court, Long filed motions to dismiss the indictment and for suppression of evidence pursuant to the Federal Rules of Criminal Procedure. The latter motion requested that the court suppress evidence obtained both as a result of the search and seizure of the persons of John Hackett and/or Norman Irvin, and of the premises known as a 1966 1½-ton Dodge pick-up truck, red with white stripes, bearing Pennsylvania license number C13796C, which property was seized on October 16, 1974.

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Upon the motions, the Honorable Edward Dumbauld, United States District Judge, issued an order suppressing the evidence seized on October 16, 1974, on the grounds that the allegations of the affidavit were inadequate as to the impact upon interstate commerce. In that same order, the court granted Long's motion to dismiss with respect to Count IV.

Pursuant to the provisions of 18 U.S.C. §3731, the government appealed from the order of Judge Dumbauld. The United States Court of Appeals for the Third Circuit heard this appeal and rendered its decision on April 23, 1976, reversing the district court's order. 534 F.2d 1097 (3rd Cir. 1976).

Following the action of the Third Circuit, the case was reassigned to the Honorable Daniel Snyder, United States District Judge, and a joint jury trial of Francis P. Long and co-defendant John Hackett was held, commencing September 29, 1976, in the United States District Court for the Western District of Pennsylvania. At the conclusion of the government's case, the court granted Long's motion for judgment of acquittal as to Count II of the indictment and denied the same motion as to Counts I, III and IV.

Long was convicted of Counts I, III and IV. Subsequent to his conviction, Long filed a motion for a new trial. The court, after consideration of briefs submitted by both Long and the government, denied the motion and issued an opinion in support thereof.

On November 5, 1976, Long was sentenced to imprisonment for a term of thirty days on the conspiracy count, and he received a suspended sentence and a three-year period of probation on the remaining counts. He

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was also ordered to pay a \$25,000 committed fine and the costs of prosecution.

The judgment of sentence was affirmed by the United States Court of Appeals for the Third Circuit on March 6, 1978. A petition for rehearing was denied on September 14, 1978.

The within Petition for Writ of Certiorari follows.

Facts

Petitioner is an eighty-two year old man who serves as the president and sole owner of Long Hauling Co., a Pennsylvania corporation engaged in the business of hauling garbage, primarily through municipal contracts. Among the municipalities served by Long Hauling Co. is the Borough of North Braddock, Allegheny County, Pennsylvania.

The investigation began when Norman Irvin, a councilman for the Borough of North Braddock, related to Special Agent Edward L. Stewart of the Federal Bureau of Investigation (FBI) his belief that pay-offs were being made to members of the North Braddock Council by Long Hauling Co., which had the North Braddock Borough garbage contract. The investigation focused upon whether there were violations of the Hobbs Act as extortion (18 U.S.C. §1951) or of the Organized Crime Control Act of 1970 as bribery (18 U.S.C. §1961, *et seq.*).

On October 9, 1974, Special Agent Stewart interviewed Long. During the course of that interview, Mr. Long denied having ever given kickbacks to North Braddock Borough councilmen in order to do business with that municipality. He admitted knowing one of the

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councilmen, a Jordan Scarpino, but denied knowing the other councilmen, namely Mike Drabick, Donald Pruchnitzky, John Hruska, Terry White, Richard Foster or Norman Irvin. On October 15, 1974, Agent Stewart was contacted by Mr. Irvin. Mr. Stewart and Mr. Irvin met on the following day and Agent Stewart provided Mr. Irvin with a tape recorder to be hidden on his person for the purpose of recording any conversations that Mr. Irvin was expected to have on that date with the defendants Long and Hackett.

Agent Stewart obtained a search warrant on October 16, 1974, from a federal magistrate. On that same date, other agents of the FBI conducted a physical surveillance of Long Hauling Co. Photographs taken by the FBI of Mr. Hackett and Mr. Irvin, while present at the Long Hauling Co., were introduced into evidence. The aforementioned search warrant was issued to search and seize the persons of John Hackett, Norman Irvin and one 1966 Dodge ½ ton pick-up truck in which Mr. Irvin and Mr. Hackett were known to be riding on that date.

After being advised by FBI agents who were surveilling the Long Hauling Co. that Mr. Hackett and Mr. Irvin had left the premises, Agent Stewart and Agent Lanahan executed the search warrant upon the persons of Mr. Hackett, Mr. Irvin and also searched the 1966 Dodge ½ ton pick-up truck. In the course of the search, the agents seized nine (9) plain envelopes, each containing the sum of \$240.00 in United States currency from Mr. Hackett. Agent Stewart stated that at the time of the search, Mr. Hackett told him that the \$2,160.00, seized by the FBI in the nine separate envelopes was "raffle ticket money".

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During the course of Mr. Stewart's testimony, in response to questions from the prosecutor, he testified that he received certain other envelopes from Mr. Irvin on June 6, 1974. He then stated that the first envelope was marked "Long Hauling Co., Monday, March 18, 1974, 10 P.M." Counsel for Long objected on the basis that the witness was reciting information which was contained on the envelope and that there had been no groundwork laid for the introduction of the information written on the envelope by another witness who had not yet testified (hearsay). Counsel's objection was overruled by the court.

These three envelopes were later marked as government exhibits 1, 2 and 3. The writing which was contained on the envelopes is substantially reproduced in the opinion of Judge Snyder which is set forth infra at Appendix A. (7a-8a). It is to be noted that government exhibits 1, 2 and 3 were typewritten versions of earlier handwritten notations made by Mr. Irvin on three separate envelopes (the handwritten versions which were identified as government exhibits 1A, 2A and 3A).

At the conclusion of Agent Stewart's testimony and before Mr. Irvin had an opportunity to testify, the Assistant United States Attorney moved for the admission of government exhibits 1, 2 and 3, together with certain other exhibits. Counsel for Long objected once again to the admission of the envelopes as exhibits on the basis that the envelopes contained "other information supplied to the FBI witness by third-parties who have not yet testified . . .". The court overruled the objection and admitted government exhibits 1, 2 and 3 into evidence.

Norman Irvin, a member of the North Braddock Borough Council during the time in question and the principal government witness, testified that he was elected to take office as a North Braddock Borough councilman in January, 1974. Mr. Irvin related that he knew the defendant, John Hackett, and that the North Braddock Borough had a garbage hauling contract with Francis P. Long. Mr. Irvin stated that shortly after he took office Mr. Hackett told him that he "should receive money each month for the garbage contract". In response to the prosecutor's questions, Mr. Irvin stated that Mr. Hackett told him that he should receive the sum of \$50.00, a month. Over objection for Counsel for Mr. Hackett, and once again in response to the prosecutor's question, Mr. Irvin stated that Mr. Hackett told him that a higher amount used to be paid. The court overruled the objection and the witness stated that "the prior contract was \$100.00 per month, per councilman", paid by Long Hauling Co. to the members of North Braddock Borough Council.

The prosecutor then questioned Mr. Irvin as to whether, after becoming a councilman, he had conversations with a Mr. Scarpino, who was also a member of the North Braddock Borough Council. In response to the questioning, Mr. Irvin stated that he was given a payment of \$50.00 one evening from Mr. Scarpino. Questioning in regard to the source of those funds was not permitted.

Mr. Irvin testified that after he received the money from Mr. Scarpino, he took it home and placed it in an envelope, sealed and marked it. He further stated that he made certain notations on the envelope which reflected the substance of the conversations he had previously had with Mr. Scarpino.

Mr. Irvin testified that he also was familiar with a Donald Pruchnitzky, who was another member of the North Braddock Borough Council. He stated that he had had conversations with Mr. Pruchnitzky who gave him \$100.00 on one occasion and the sum of \$100.00 on a separate occasion. After receiving the money from the two separate meetings with Mr. Pruchnitzky, he took it home, placed it in separate envelopes, sealed it, marked it, and made certain notations on it reflecting what Mr. Pruchnitzky had said to him.

Mr. Irvin stated that in May, 1974, he contacted the Chief of Police of North Braddock Borough to let him know about the prior payments of money. In response to the prosecutor's question, Mr. Irvin also testified, "I told him it was kickback money from Long Hauling". An objection to that testimony was sustained.

Mr. Irvin testified that on October 14, 1974, he was asked by Mr. Hackett to drive him to Long Hauling Co. in Duquesne for the purpose of picking up a sum of money from Long to be distributed to other council members. Mr. Irvin stated that on October 15, 1974, he and Hackett went to Long Hauling Co. and discussed the payment of this money with petitioner Long. Subsequent to this meeting, Irvin and Hackett agreed to return the next day to receive the sum of money which had been discussed.

On the morning of October 16, 1974, Irvin met with Special Agent Stewart and concealed on his person a tape recorder to record the events of the afternoon. Portions of those tape recordings were played for the jury and introduced into evidence. The tape recordings disclosed that while Mr. Irvin and Mr. Hackett were still at Long Hauling Co., Long said: "That straightens

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you up to October, see, and then every two months, you know . . . it's only \$120.00".

After departing from the Long Hauling Co., Mr. Irvin and Hackett were stopped and searched by the FBI pursuant to the previously mentioned search warrant. Immediately after the FBI departed, Hackett stated to Irvin, "raffle tickets . . . we got to get 2,000 raffle tickets over, take them over. Roman's got 2,000." The tape also disclosed that Hackett said, "yea, I told that 'em we was there about the raffle tickets, that's all right, he always give it, he don't even know, he gives me money. Let's see what Red Long says". The same tape recording also reflects that Hackett and Irvin agreed to make yet another trip to the Long Hauling Co. on the following day. At that point in the tape, Hackett stated, "The only thing we can do right now is go and see him in the morning. We go in the morning and get those 2,000 tickets from Roman".

On the following day, October 17, 1974, Mr. Irvin and Mr. Hackett went to the Long Hauling Co. Mr. Irvin explained to Mr. Long that the FBI had seized the nine envelopes, each containing the \$240.00, which Mr. Long had given to Mr. Irvin and Mr. Hackett the preceding afternoon. Irvin stated that upon being informed of the FBI's activity, Mr. Long stated, ". . . we were finished. We were beat. We were sunk and he never should have never given us the money in the beginning". Mr. Irvin then related that after Mr. Hackett told Mr. Long that he was Democratic Chairman in the Borough of North Braddock and that a raffle was in progress at the present time and that raffle tickets would "cover" the money that was confiscated, Mr. Long said that he would have to confer with his attorney "to see if it was

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legal and whether it would work or not". Subsequent to that brief conversation, Mr. Irvin stated that he took 2,000 raffle tickets from his truck, gave them to Mr. Long and informed Mr. Long that the additional 160 tickets would be delivered the following day. Mr. Irvin was testifying strictly from his own recollection of the meetings, inasmuch as the conversations were not recorded due to a tape recorder malfunction.

On the following day, October 18, 1974, Mr. Irvin testified that Hackett delivered 160 raffle tickets to his place of business. Irvin stated that he then took the 160 raffle tickets to Long. Mr. Irvin recollected that Long asked him if he thought "it would work". He also recollected that Long stated that, "we would more or less have to stick together in order for it to work".

Mr. Irvin had no further contact with Mr. Long from that date until November 1, 1974, the date of the grand jury appearance by Messrs. Irvin, Long and Hackett. On November 1, 1974, Irvin testified that he and Hackett drove to Pittsburgh to appear and testify before the Grand Jury. At that time, he was once again wearing a concealed body tape supplied to him by the Federal Bureau of Investigation. During the course of the automobile trip to the federal courthouse, Mr. Irvin and Mr. Hackett engaged in conversation, including Mr. Hackett's version of a meeting between Mr. Long and two local attorneys (neither present counsel for petitioner nor counsel on appeal) concerning the payment of money, the purchase of raffle tickets and the forthcoming appearance before the grand jury. During that same trip, Mr. Irvin stated, "but what we are doing is no different from knocking someone on the head and taking fifty bucks a month off him either, right?".

Last, Mr. Irvin testified that on the date of the grand jury appearance, he had lunch with Long and, over counsel's objection, stated that Mr. Long told him that he was "still paying off in the Boroughs of Duquesne, Munhall, Homestead and Rankin". Counsel's motion for withdrawal of a juror based upon the evidence of payments to other municipalities was denied.

On cross-examination, Mr. Irvin admitted that the purpose of the October 18, 1974, trip to Long Hauling Co. was to persuade Mr. Long to go along with Mr. Hackett's idea of explaining the payment money as one for raffle tickets. The witness first stated that it was at Mr. Hackett's urging that Long went along with the raffle ticket story. Later, in his testimony, after having his recollection refreshed from prior recorded grand jury testimony, the witness admitted that, "we suggested the raffle tickets and he [Long] said he didn't think it would work anyhow, but we left the tickets with him". Mr. Irvin also admitted that Mr. Long did not urge or suggest to him that he was to convey the raffle ticket story to anybody. The witness admitted that Mr. Long never said that he would tell a raffle ticket story, but only said that he would discuss the matter with his attorney. Upon pursuing this line of questioning further, it was admitted that the raffle ticket story was conceived by Mr. Hackett and Mr. Irvin and that it was the two of them who attempted to induce Mr. Long to go along with this version of the facts.

Mr. Irvin also testified that during the entire period of time that he was a councilman in North Braddock Borough, Mr. Long never requested that he perform or do anything for the Long Hauling Co. or Mr. Long personally. Mr. Irvin said that he did not, in fact, perform

any service or refrain from doing anything for Mr. Long or Long Hauling Co. Mr. Irvin also admitted that to his knowledge, no other councilman had done anything in the nature of a favor for Long Hauling Co. and that Mr. Long had never suggested to Mr. Irvin that he was to be treated in any special way by himself. Mr. Irvin also stated that the garbage contract had previously been put out for public bids, that it was advertised in the local newspapers in accordance with the law, and that Mr. Long had won the bid.

With regard to government exhibits 1, 2, 3 and 1A, 2A and 3A, Mr. Irvin testified that the sum of money inserted into government exhibit 1A was given to him by Mr. Scarpino. He admitted that at the time the money was given to him, Mr. Scarpino did not tell him that it was for a payoff or a bribe, but only that it was for the garbage contract. Further, Mr. Scarpino never told him that he would have to do anything for the sum of money he had received. Mr. Irvin did not, in fact, do anything for the money he had received. The information on the envelopes was based on his own assumption and not upon anything conveyed to him by Mr. Irvin.

The witness also admitted that with regard to government exhibits 2A and 3A, received from Mr. Pruchnitzky, Mr. Pruchnitzky never told him where the money had come from. Mr. Pruchnitzky did not tell him that the money constituted a payoff or a bribe. The witness admitted that anything at all which appears on the envelope other than the date and time of payment from Mr. Pruchnitzky was based on his own assumption and not based upon anything that Mr. Pruchnitzky told him.

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The government then introduced into evidence the transcripts of the grand jury testimony of both Mr. Long and Mr. Hackett. In their grand jury testimony, both men denied having been engaged in payoffs or bribery and both stated several times that the payment of money on October 16, 1974, was for raffle tickets and did not constitute a payoff or a bribe.

Neither Mr. Hackett nor Mr. Long took the witness stand to testify in their own behalf. Mr. Long did present numerous character witnesses who testified that his reputation for truth and veracity was good and that he was a peaceful and law-abiding citizen in the community in which he lives. The government presented no rebuttal testimony concerning Mr. Long's testimony.

Reasons for Granting a Writ of Certiorari.

**REASONS FOR GRANTING
A WRIT OF CERTIORARI**

I.

The Evidence Seized Pursuant to the Search Warrant Should Have Been Suppressed Because the Facts Set Forth in the Affidavit Do Not Establish Probable Cause Since Those Facts Were Based Upon the Uncorroborated Statements of an Unnamed Informant Whose Reliability Was Not Properly Established Under Applicable Decisions of This Court.

Petitioner Long contends that the court of appeals has decided a federal question in a way which conflicts with applicable decisions of this Court.

The affidavit in support of the search warrant which was used to search and seize the persons of John Hackett and Norman Irvin and one 1966 Dodge one-half ton pick-up truck, was based almost entirely upon material supplied to the affiant by an unnamed informant. Petitioner Long recognizes the well established principle that all that is needed to be shown is a probability of criminal activity and not proof beyond a reasonable doubt. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223 (1964). He is also cognizant of the principle that the affidavit in support of a search warrant must be tested by much less rigorous standards than those which govern the admissibility of evidence at trial. *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056 (1967). However, in making a determination of probable cause, the judicial officer must make an independent ruling that such probable cause exists from the statements and information proffered by the affiant and contained within the four corners of the affidavit.

A.

Failure to Establish the Informant's Reliability

In the case before this Court, the initial step in the analysis as to whether a probable cause determination was made by the magistrate is to question whether that determination was based solely upon the informant's tip, the tip plus corroborating evidence, or the tip and other criminal activity. In the attachment to the search warrant, the affiant set forth as follows:

Confidential informant is known to be a reliable informant since May, 1974. The information provided to date by this informant has been corroborated by independent investigation by myself and other special agents of the Federal Bureau of Investigation.

If the tip alone or the tip plus corroboration are the only grounds for the finding by the magistrate that probable cause exists to issue the warrant, then Petitioner respectfully asserts that *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964), require that the tip or the tip plus corroboration must meet certain constitutional standards. In the instant case, although the tip was allegedly corroborated by "independent investigation", no facts set forth in the affidavit establish how or what type of investigation was used or how the informant's tip was corroborated. A fair reading of the attachment or affidavit to the search warrant in this case establishes that it was only the tip upon which the agents were basing their application for the search warrant. Nowhere in the affidavit is it set forth that affiant had any personal knowledge acquired from in-

dependent investigation upon which probable cause could be based.

In *Aguilar*, this Court determined that the following information supplied in an affidavit was insufficient:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above-described premises for the purpose of sale and use contrary to the provisions of the law." 378 U.S. at 109.

The Court found that the aforementioned warrant had been issued improperly in that the conclusions as set forth above were based upon two inferences that had been made by the police and not by a neutral magistrate. First the affidavit did not reveal to the magistrate any factual basis from which the informer could have concluded that either contraband, illegal activity or evidence thereof could be found in the area. Secondly, there was no evidence in the affidavit to support the inference that the informant was a credible person. A mere conclusion by the affiant that the informer is "reliable" is not sufficient.

In *Spinelli*, the Court defined what use could be made of evidence above and beyond the informant's tip as related in the affidavit. In that case, the F.B.I. set forth the following information in the affidavit to the search warrant, (in summary):

- (1) They (the F.B.I.) had been informed by a confidential source that Spinelli was operating a wagering business through two phones;
- (2) For five days, Spinelli was observed by the F.B.I. and on four of those days he crossed

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from Illinois to Missouri and entered a specific department in a certain building;

- (3) The phones and the numbers supplied by the informant were checked with the phone company and found to belong to Spinelli;
- (4) A final conclusory statement that Spinelli was known to the agents as a bookmaker and an associate of bookmakers, gamblers, etc.

In the *Spinelli* decision, the Court held that the two-pronged test of *Aguilar* was not met. A tip may be elevated to such a degree of reliability as to support probable cause if a great amount of detail is set forth by the informant and such detail was based upon first-hand knowledge of the informant.

The case before the Court must be distinguished from that line of cases following the *Spinelli* rationale and finding probable cause based upon an informant's tip because of the wealth of detail set forth in the affidavit. For example, in *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, (1971), the informant admitted to involvement in criminal activity with the defendant and set forth in laborious detail how and where the defendant's illegal activities took place. In *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725 (1960), the informant gave a detailed description of the apartment where the narcotics traffic occurred.

By way of contrast, in the instant case, there is no massive factual statement or wealth of details as was set forth in *Harris* and *Jones* to prove the reliability of the informant. All of the facts set forth in the instant affidavit involved one single meeting between the affiant and the unnamed informer. As such, the facts

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and details set forth in the affidavit are insufficient to establish the reliability of the informant's statements.

Similarly, no plethora of details as set forth in *United States v. McNaly*, 473 F.2d 934 (3rd. Cir. 1973), has been established to meet the reliability standards of the informant as set out in *Spinelli*. In the case before the Court, the issuance of the search warrant was based almost entirely upon information supplied to the F.B.I. by an unnamed informant. The only evidence of that unnamed informant's reliability is a factually unsupported conclusion by the affiant that the informant is, in fact, reliable. The government failed to set forth how it established the reliability of the unnamed informant. The affidavit does not establish prior arrests or convictions based upon information supplied by this particular informant. The F.B.I. did not elaborate on the "independent investigation" which the affiant maintained established the reliability of his informant. The facts set forth in the affidavit do not tell us what type of investigation occurred, how long it took, or how in the course of investigation, the F.B.I. found particular items of information previously proffered by the informant to have been reliable. Rather, a mere conclusion of reliability without a supporting factual basis is set forth in this affidavit.

B.

Lack of First-hand Information

An analysis of the type of information supplied by the informant discloses that he did not have first-hand information of the facts which he related to the affiant. Most of the information supplied to the affiant was information which the unnamed informant gathered from rumor and hearsay.

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The language of the affidavit involved in the case before the Court constitutes an admission that the information received by the affiant was not first-hand information but was merely rumor or hearsay gained from other persons, also unnamed, and whose reliability is not set forth in the affidavit. Two of the attachments state that:

"confidential informant advised that through conversation with John Hackett and other council members for the Borough of North Braddock (emphasis supplied), that Francis P. Long, d/b/a Long Hauling Co., 1420 Duquesne-Homestead Road, Duquesne, Pennsylvania, pays approximately fifty (50) dollars per month to each council member for the Borough of North Braddock, Pennsylvania, in return for having the contract with the Borough of North Braddock, Pennsylvania, to remove garbage from the Borough of North Braddock, Pennsylvania."

Thus, it was not facts which were supplied by the informant to the affiant. Rather, it was rumor and hearsay which the informant heard through conversations with other persons. Although it is a well known principle of the law that hearsay evidence may be used to support probable cause, the type of hearsay evidence in the instant case is not sufficient. In effect, the affidavit is made up of hearsay upon hearsay. First, the affiant related what had been told to him by a third person (the informant). The second hearsay is that the third person (unnamed informant) received his information from other persons. Unlike those cases in which the informant personally had knowledge of the illegal activity based upon his own observations and/or involvement, this affidavit admits that the information of the inform-

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ant was based upon knowledge gained from other persons. Further, the affidavit does not even set forth that these other persons who supplied information to the informant ("John Hackett and other council members") themselves had first-hand information. Thus, even the information which the unnamed informant gained through "conversations with John Hackett and other council members" would have been more remote and even more unreliable than hearsay on hearsay since it was not based on the first hand knowledge of Hackett and the other council members.

The remainder of paragraph two of the affidavit does not allege any criminal activity. It merely sets forth that an arrangement was made by the informant to secure a certain sum of money from Mr. Long for distribution to the members of the North Braddock Borough Council. Certainly, such conduct in agreeing to make such a payment on behalf of Mr. Long is equally consistent with legitimate as well as criminal activity. The only reference to any criminal activity is that the payment was "in connection with the above-mentioned pay-off". But, as discussed earlier, the affiant's only knowledge of any "pay-off scheme" was not first-hand but was based upon rumor and hearsay. Even the informant's assertion that the purpose of transferring the money from Long to Hackett and Irvin was "in connection with the above-mentioned pay-off scheme", was based upon hearsay information received by the informant from others.

The balance of the affidavit sets forth general information as to the identity and business of Francis P. Long. Certainly this type of information has no bearing on the question of whether there is a reasonable belief that "criminal activity" is afoot.

II.

The Introduction of Evidence of Other Alleged Criminal Activity Was So Unfairly Prejudicial as to Violate Rule 403 of the Federal Rules of Evidence and Deny Petitioner the Due Process of Law.

Petitioner Long contends that the court of appeals has sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Specifically, it is Long's position that the appellate court approved the trial court's denial of a defense mistrial motion even though the government introduced evidence of other alleged criminal activity which was so unfairly prejudicial as to violate Rule 403 of the Federal Rules of Evidence and deny him the due process of law.

Federal Rule of Evidence 404 (b), 28 U.S.C. §404 (b), provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Rule 404 (b) must be read in conjunction with Rule 403, which provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, wasted time or needless presentation of cumulative evidence.

It has generally been acknowledged that neither Rule 403 nor 404 of the Federal Rules of Evidence established new law. Rather, those sections were merely codifications of the prior law concerning the admissibility of evidence of other crimes or wrongs in a criminal prosecution. Indeed, even prior to the adoption of the Federal Rule of Evidence 404 (b), the only major disagreement in the courts concerning the application of the Rule was whether it was "inclusionary" or "exclusionary". The majority of the courts expressed their "other crimes rule" in an exclusionary form; that is, evidence of other crimes is not admissible except for a host of purposes. See *e.g.*, *Spencer v. Texas*, 385 U.S. 554, 560-562, (1967). A minority of the courts had adopted the inclusionary form of the rule which was generally interpreted to mean that evidence of other crimes is admissible except when offered solely to prove criminal character. See, *e.g.*, *United States v. Daton*, 381 F.2d 114, 117 (2d Cir. 1967).

Regardless of the rule adopted by the courts, it has always been abundantly clear that the trial judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the other crimes is outweighed by its prejudicial character. *Spencer v. Texas*, *supra*, 385 U.S. at 561; *United States v. Jacangelo*, 281 F.2d 574 (3rd Cir. 1960).

It is also well-established that evidence of other crimes is competent in a criminal trial to prove the specific crime charged when it tends to establish a common scheme, plan or system, embracing the commission of two or more crimes, so related to each other that proof

of one tends to establish the other. *Heike v. United States*, 227 U.S. 131 (1912); *United States v. Stirone*, 262 F.2d 571 (3rd Cir. 1948); *United States v. Sweeney*, 262 F.2d 272 (3rd Cir. 1959).

In the instant case, the prejudicial effect of the evidence of other criminal offenses was compounded by the scant proof of such other offenses, the prosecutor's repeated references to it, the court's reiteration of such evidence in its charge, and last, the prosecutor's suggestion that the petitioner was involved in certain criminal activities other than the ones mentioned in the testimony. There can be no argument that the references to other criminal activity was an advertent oversight; rather, the prosecutor specifically elicited such information and it was given in response to his questions.

Mr. Norman Irvin, the principal government witness, had testified completely and thoroughly concerning the events surrounding the payment of the sums of the money from Mr. Long to Mr. Irvin and Mr. Hackett and also, concerning the subsequent events up to and including Mr. Long's grand jury appearance. In addition, the government had previously introduced into evidence the tapes of clandestinely-recorded conversations between Messrs. Irvin and Hackett and Mr. Long. After that testimony and the playing of the tapes, the prosecutor asked the following questions:

- Q. Now, on November 1, 1974, did you have lunch while waiting to go to the grand jury?
- A. Yes, I did.
- Q. Who was present at that lunch?
- A. Mr. Pruchnitzky and Mr. Long.

- Q. During that lunch, what conversation, if any, did you have with Mr. Long concerning garbage contracts?
- A. He told me at lunch that day, that he was still paying off in Duquesne, Munhall, Homestead and Rankin.

Mr. Cindrich: This is objected to. That is not a proper place in this trial.

The Court: Objection overruled.

By Mr. Roark:

- Q. What was the conversation?
- A. He said he was still paying off the Boroughs of Duquesne, Munhall, Homestead and Rankin.

Following the above testimony, counsel for petitioner, outside of the presence of the jury, made a motion for withdrawal of a juror on the basis that the prosecutor had elicited testimony concerning Long's alleged illegal acts in other municipalities which are not a part of this case. The motion was denied by the district court. Interestingly enough, the court recognized that:

... we are not trying the bribery payoff kickback case. That isn't the case we are trying. The only case we are trying here are the cases involved in the substantive offenses, Counts II, III, IV and V. Plus the conspiracy, which have to do with the obstruction of justice and perjury.

Counsel's requests to have further testimony concerning the offenses in other municipalities eliminated from the trial were also denied. The court justified the admission of the testimony concerning other offenses on the basis

that it "casts doubt upon the whole defense which you very forcefully brought on cross-examination with respect to raffle tickets". It is to be noted that at the time this information was elicited, no defense had been entered in the case, inasmuch as the prosecution had not yet rested. Further, Mr. Long did not take the stand during the course of the trial, and no evidence, save character testimony, was introduced on behalf of Mr. Long.

That the prosecutor intentionally introduced the evidence of other, unrelated offenses, not truly for the legitimate purpose of showing a common plan, scheme or design, but for the purpose of maligning petitioner Long and stripping him of the presumption of innocence, is amply demonstrated by other prejudicial remarks during the course of his closing address. Even worse, there was absolutely no evidence in the record to support most, if not all, of the other prejudicial and inflammatory remarks made by the prosecutor. The following are illustrations:

What does the defendant Long say to that? He says, I should never have given you money. No word about raffle tickets. I should never have given you the money and I will have to check with my lawyer to see if it will work.¹

Now, if he is buying \$2,160.00 worth of raffle tickets, why does he have to check with his lawyer to see if it will work? Then, what is discussed? If we all stick together, if we all stonewall. If we all cover it up, it will work.

1. Actually, the testimony from Mr. Irwin was that Mr. Long said he would have to confer with his attorney "to see if it was legal and whether it would work or not." (emphasis supplied)

There is absolutely no evidence in the record to suggest that Mr. Long ever stated to Mr. Hackett, Mr. Irvin, or any other person that "if we all stonewall it. If we all cover it up, it will work". The allusions to the Nixon Administration cover-up in this post-Watergate era were most damaging to petitioner Long's case. If such statements were supported by the testimony produced at the trial, Long would have no objection; however, a thorough search of the record produced in this case will disclose that such statements and comments were figments of the prosecutor's imagination and not based upon either direct or indirect evidence produced at the trial. Later, in the prosecutor's rebuttal argument, he made the following comments concerning the other alleged misconduct:

Now, what did Mr. Long say to Mr. Irvin at lunch? What do you recall about that testimony? Mr. Irvin, as I recall it, said the defendant Long told him at lunch, I am still paying, still paying; Rankin, Munhall, Duquesne and Homestead, I am still paying there.

Does that mean that he is still paying there, but he is not paying in North Braddock, because the heat is on? That is something for you to think about.

After an admonishment by the court that the argument was limited to rebuttal, the prosecutor continued:

But, there are other foundations and other pillars upon which our country is built and one of those is a government of the people, by the people, for the people. *Not in the backrooms at Long Hauling Co., and other-under the table to the council of North Braddock and how many other garbage contracts*

*Mr. Long had bought that way?*² (emphasis supplied)

Thus, the prosecutor not only introduced evidence of other alleged wrongdoings in four separate municipalities, but made the clear suggestion to the jury that petitioner was involved still in other illegal activity. The rhetorical question, "How many other garbage contracts has Mr. Long bought that way?", can be interpreted only as a statement that he was engaged in illegal bribes or kickbacks, not only in North Braddock Borough, but in Rankin, Munhall, Duquesne, Homestead and in many other places. Federal Rule of Evidence 404 never contemplated that the government could make a blanket indictment of the defendant's conduct and activity in matters totally unrelated to the issue at trial and without any proof or evidence to suggest that such allegations are true.

It must also be pointed out Long was being tried for various offenses, including conspiracy, obstruction of justice and knowingly making a false material declaration to the grand jury. It is somewhat confusing as to how evidence of his possible criminal activity in "paying-off" other municipalities is relevant at all to the charge of perjury or obstruction of justice. It strains credulity to accept the government's argument that "proof" of his payments to Braddock, Rankin, Munhall or Homestead, somehow show a motive, intent, knowledge, plan, design or course of conduct to permit perjury or obstruct justice. While such evidence might have been arguably admissible on a charge of a violation of 18 U.S.C. §1961,

2. Trial Counsel's notes and recollections of the above is as follows: "... and God knows how many other contracts Mr. Long has bought that way?"

et. seq. (bribery), evidence of payment to other municipalities in a perjury trial is either totally irrelevant or is far outweighed by its prejudicial effect.

It is conceded that the decision whether to admit such testimony into evidence rests within the sound discretion of the trial court, but, it is respectfully submitted that the court abused its discretion. Moreover, plain, clear, and conclusive evidence should be required to establish that other similar offenses have any bearing on the accused's intent in the matter before the court. See, *Henderson v. United States*, 143 F.2d 681 (9th Cir. 1944). Likewise, it cannot be reasonably argued that other alleged criminal acts were so blended or connected with the one on trial that proof of the one incidentally involves the other, or that they explain the circumstances of the offense which is before the court, or that they logically tend to approve any element of that offense. *Harper v. United States*, 239 F.2d 945 (D.C. Cir. 1956).

Even assuming *arguendo* that the government is correct in its assertion that the evidence of other offenses was not used merely to put the accused in a bad light before the jury, or to characterize him as an evil person, there was not sufficient proof that Mr. Long was guilty of any other offense. The distinction between the Hobbs Act, 18 U.S.C. §1951 (extortion), and the RICO Act, 18 U.S.C. §1961 (bribery) is subtle. The mere fact of a payment from a private individual to a public official proves neither bribery nor extortion. For the crime of bribery to have been committed, there must have been a payment of money or some other consideration for the purpose of affecting the exercise of some official conduct. On the other hand, if the money is demanded by

the government official in order for the private citizen to obtain a legitimate right, the conduct amounts to extortion.

There was no evidence offered by the government to show whether Mr. Long was extorted in the communities mentioned. There was no evidence that the exercise of official discretion was involved. Nonetheless, the Assistant United States Attorney strenuously argued to the jury that the alleged comment made by Mr. Long at his luncheon meeting with Mr. Irvin indicated that he was guilty of the crime of bribery in other communities. Not only has there not been a prior conviction of such an offense, but no other proof was offered to show the criminality of the alleged payments.

The attempted curative instruction of the court did not eliminate the prejudicial effect of the testimony. At the request of the prosecutor, the court, at the *conclusion* of its charge, instructed the jury as follows:

Now, there is a principle of law that says that you may consider like acts or a pattern of activity to prove specific intent. The willful, intentional or deliberate value of the act charged.

That is, which are not concerned with here—let me put it the other way, we are concerned here only with whether or not there were payoffs, kickbacks or bribes. As far as North Braddock is concerned. You may look to any other statements such as Rankin, Munhall, anything of that kind, if you first find that the statements were made.

You may look to them to determine whether there was a pattern of activity to prove the specified intent about which we are talking.

We are not concerned in this case with any question with respect to Munhall or any other place than North Braddock, because these questions were solely related at that point and that is solely the charge in the indictment. But, you can look to those other matters to determine whether or not there was a conspiracy to answer questions as charged in the indictment.

The charge of the court, given at the request of the prosecutor immediately before the jury retired, served only to reiterate for at least the fourth time during the course of the trial that the government believed Mr. Long guilty of making bribes to public officials in other communities.

Even after counsel's motion for withdrawal of a juror, based upon the prosecutor's rhetorical question to the jury asking how many other garbage contracts Long had bought, the court made no curative instruction and did not order such evidence stricken from the record. Indeed, it is doubtful whether the prosecutor's open-ended accusation against Long in relation to other crimes, together with the evidence concerning the specific municipalities other than North Braddock could have been purged from the jury's mind even if the judge had offered a curative instruction.

"The most valiant striving on the part of a conscientious juror to comply with the trial judge's admonition to 'strike it from your minds entirely'; 'just force it out'; 'pay no attention to it whatsoever'; could, in the case of some jurors be an exercise in futility. To hold that the cautionary instruction was an effective deterrent which completely laundered out of the jury's mind the impact of the

prosecutor's question, is unrealistic and little less than fantasmagoria. A trial judge can 'strike' evidence from notes of testimony. It is something else again to 'strike' its searing impress from a juror's mind. Apt here are these following immortal lines:

'The moving finger writes, and having writ' moves on: nor all your piety nor wit shall lure it back to cancel half a line; nor all your tears wash out a word of it.' *Rubāiyāt*, Stanza 71.

The Supreme Court has held that cautionary admonitions of a trial judge are ineffective to erase from the minds of a jury the effects of prejudicial testimony. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968).

In *Bruton*, the Court, at page 129, quoted the following statement in Mr. Justice Jackson's concurrence in *Krulewitch v. United States*, 336 U.S. 440, at page 453, 69 S.Ct. 716, at page 723, 93 L.Ed. 790 (1949):

The naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction... (footnote omitted)"

(citations omitted), *United States v. Gray*, 468 F.2d 257, 260 (3 Cir. 1972).

III.

The Introduction of Hearsay Evidence in the Form of Documents and Testimony Was so Prejudicial as to Deny Petitioner the Due Process of Law.

Petitioner Long contends that the court of appeals so far sanctioned a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Specifically, Long avers that the introduction of certain hearsay evidence was so prejudicial as to deny him the due process of law.

It is respectfully submitted to this Court that prejudicial and reversible error was committed when, during the direct examination of Special Agent Stewart, the first witness called by the government, hearsay information was admitted into evidence without proper foundation or basis. That evidence came in the form of certain information which was written on envelopes designated as government exhibits 1A, 2A and 3A and the type-written versions of the same exhibits designated as government exhibits 1, 2, and 3. Testimony later developed in the case discloses that the envelopes were used by Mr. Irvin as repositories for certain sums of money he received from a Jordan Scarpino on one occasion and from a Donald Pruchnitzky on two subsequent occasions. Although Mr. Irvin had not yet testified, and no foundation was laid for the introduction of those envelopes, the court admitted the same into evidence over objection of counsel for Long.

When Mr. Irvin did testify, he first attempted to relate information which was conveyed to him by Mr. Scarpino at the time he received the money which was

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in government exhibit 1A. The court sustained counsel's objection to the hearsay testimony. Mr. Irvin then testified that after he received the money from Mr. Scarpino, he took it home, placed it in an envelope, sealed it and marked it. He then made certain notations on the envelope which reflected the substance of the conversations that he had previously had with Mr. Scarpino.

The witness testified that on two subsequent occasions, he received sums of money from Donald Pruchnitzky. The witness again testified that he placed the money in the envelopes, marked government exhibits 2A and 3A, sealed them and made certain notations on them, reflecting the substance of the conversations he had had with Mr. Pruchnitzky.

Thus, Mr. Irvin admitted that the notations on the envelope constituted versions of information supplied to him by out-of-court declarants, *viz.*, either Mr. Scarpino (government exhibit 1, 1A) or Mr. Pruchnitzky (government exhibits 2, 2A, 3, 3A). Despite the fact that the court sustained the objection to Mr. Irvin's relating what he had been told by Mr. Scarpino, the court had already admitted the envelopes into evidence. Thus, the very same hearsay information which the court ruled out of evidence, pursuant to counsel's objection, had already been placed into evidence through Agent Stewart. To compound the error, the handwritten versions of the envelopes, reflecting the same information as prepared by Mr. Irvin, were also introduced into evidence over objection of counsel.

The hearsay information contained on those envelopes was extremely damaging to Long's case. Government exhibits 1 and 1A reflected not only that the witness had received the sum of \$50.00 from Jordan Scar-

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pino (which subsequently turned out to be the only facts the witness could testify to on his own first-hand knowledge), but also, had the notation, "Long Hauling", and "JAN". Government exhibit 2 also contained the information, "Long Hauling", and "Feb & March". Government exhibit 3 contained the notation, "Long Hauling", and the further information, "April & May".

Upon cross-examination of Mr. Irvin, he admitted that with regard to government exhibits 1 and 1A, Mr. Scarpino did not tell him that the money was for a pay-off or a bribe. Mr. Scarpino never said that the money reflected a payment for "Jan".

On further cross-examination, the witness admitted that with regard to government exhibits 2, 2A and 3, 3A, Mr. Pruchnitzky never told him that the money was from "Long Hauling", or that it was in payment for "Feb & March", or "April & May". Thus, with regard to government exhibits 1 and 1A, the only information which was conveyed to Mr. Irvin by Mr. Scarpino was that the money was from "Long Hauling". With regard to the balance of the exhibits, the only information on the envelopes which was based on Mr. Irvin's knowledge was the date, time and amount of payment. The balance of the information was not conveyed to Mr. Scarpino by Mr. Pruchnitzky—i.e. that the money was from Mr. Long and that it constituted payments for the months of February through May. Thus no connection between government exhibits 2, 2A, and 3, 3A and Long was established.

In summary, to the extent that the notations on the envelope contained information conveyed to Mr. Irvin by Mr. Pruchnitzky or Mr. Scarpino, it was hearsay, and, therefore, inadmissible. To the extent that the envelopes

contained information which was conveyed to Mr. Irvin by no person, but which were the product of his assumptions and conclusions, it was also inadmissible.

Federal Rule of Evidence 801(d)(2)(e) provides that a statement is not hearsay if it is a "statement by a co-conspirator of a party during the course and in furtherance of the conspiracy". Although the "co-conspirator exception" to the hearsay rule was not mentioned by the prosecuting attorney, the court below appears to have relied upon this exception in justifying its ruling. In its opinion, the district court stated:

Their statements that the money was from Long Hauling Co. was within the limitations of admissibility of statement of co-conspirators to those made 'during the course and in furtherance of the conspiracy' as set forth in Federal Rule of Evidence 801(d)(2)(e). Such statements have been admitted even though no conspiracy was charged. (footnote omitted)

Although neither Mr. Scarpino nor Mr. Pruchnitzky were indicted or unindicted co-conspirators, and although the trial of the matter before the court involved only perjury and obstruction of justice, the district court concluded that:

The evidence of concerted action between the various councilmen and Long was amply demonstrated. That being so, the statements of Scarpino and Pruchnitzky that the money came from Long was clearly admissible. See, also, *United States v. Williams*, 435 F.2d 642 (at p. 645) (9th Cir. 1970). In any event, in the light of Irvin's testimony as to this

whole matter, any claimed error would have been harmless.³

As to any information on the envelopes, other than that on government exhibits 1, and 1A, reflecting that the money came from "Long Hauling", the district court acknowledged its opinion that such information was "not conveyed to him by any other person, was based upon his belief that the money constituted payments for certain months". Nonetheless, the introduction of such opinion evidence, admittedly not based upon any first-hand knowledge of the witness, was justified by the court on the basis that other information conveyed to Mr. Irvin by Mr. Hackett would have led him to believe or form an opinion that the payments were for the months indicated on the envelopes.

It is respectfully submitted that Federal Rule of Evidence 801(d)(2)(e) did not enlarge the long accepted rule that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. See, e.g., *Hitchman Coal & Co. v. Mitchell*, 245 U.S. 229 (1917); *United States v. Craig*, 522 F.2d 29 (6th Cir. 1975); 46 A.L.R. 3d 1148, Comment. Although there are hundreds, if not thousands of reported decisions concerning the application of the rule, petitioner has been unable to find any which extend the rule to the fact situation in the case before the Court.

3. Apparently, the court read the facts in such a manner as to find that Mr. Pruchnitzky told Mr. Irvin that the money was from Long Hauling Co. Although Mr. Irvin did testify that Mr. Scarpino told him the money was from Long Hauling Co., there is no testimony in the record to support the contention that Mr. Pruchnitzky ever stated that the money was from Long Hauling Co. Mr. Irvin said that Mr. Pruchnitzky told him nothing at all at the time the money was delivered.

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Long maintains that the courts below erred in applying the so-called "co-conspirator" rule in the instant case because, first, there was no prima facie determination that there was a conspiracy between Mr. Long and the out-of-court declarants; secondly, the conspiracy between the defendant and the out-of-court declarants was not established by evidence other than hearsay itself; thirdly, the out-of-court declarants were neither indicted nor unindicted co-conspirators with regard to the case before the court; and lastly, the alleged conspiracy, if any, was as to a matter separate and distinct from the perjury and obstruction of justice charges before the court.

It is well-established that:

such declarations (of co-conspirators) are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. *Glasser v. United States*, 315 U.S. 60 (at p. 62) (1942); *Hitchman Coal & Company v. John Mitchell*, 245 U.S. 229 (1917); *United States v. Craig*, 522 F.2d 29 (1975); *United States v. Johns-Manville Corp.*, 231 F.Supp. 690 (E.D. Pa. 1963). Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence. *Glaser v. United States*, 315 U.S. 457, 467.

The same principle was recently reiterated by this Court in *United States v. Nixon*, 418 U.S. 683, 701 (1974), where it was stated:

Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by *independent evidence* of a conspiracy among

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one or more other defendants, and the declarant, and if the declarations at issue were in furtherance of that conspiracy. (emphasis supplied)

The Court also wrote:

As a preliminary matter, there must be substantial independent evidence of the conspiracy at least enough to take the question to the jury. Footnote 14, page 701.

The Court cited *United States v. Vaught*, 485 F.2d 320, 323 (4th Cir. 1973); *United States v. Hoffa*, 349 F.2d 20, 41-42 (6th Cir. 1965), *aff'd. on other grounds*, 385 U.S. 293; *United States v. Santos*, 385 F.2d 43, 45 (7th Cir. 1967), *cert. den.* 390 U.S. 954 (1968); *United States v. Morton*, 483 F.2d 573, 576 (8th Cir. 1973); *United States v. Spanos*, 462 F.2d 1012, 1014, (9th Cir. 1972); *Carbo v. United States*, 314 F.2d 718, 737 (9th Cir. 1963), *cert. den.* 377 U.S. 953 (1964). The Court also indicated that whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge. 418 U.S. 701.

It is respectfully submitted that the trial court in the instant case did not make a preliminary, threshold finding that there was a conspiracy between Francis P. Long and Messrs. Scarpino and/or Pruchnitzky. Indeed, the entire theory of the admissibility of the out-of-court declarations based upon the co-conspiracy exception was neither argued by the government nor discussed by the court during the course of the trial. (The first mention of this theory of admissibility was in the Government's Brief in Opposition to Defendant's Motion for a New Trial.) The record discloses that there was no independent evidence of a conspiracy between Long and the

two out-of-court declarants other than possibly the hearsay statements of the co-defendant, Hackett, allegedly made to Mr. Irvin. It seems abundantly clear that such evidence is not "aliunde" but is hearsay itself and, therefore, insufficient to establish the prima facie existence of a conspiracy.

The difficulty with the application of the co-conspirator rule to the case before the Court, stems partly from the fact that Long was being tried only on several counts of obstruction of justice, conspiracy to obstruct justice, and perjury. He was not tried on a substantive offense of bribery. Messrs. Scarpino and Pruchnitzky were neither named nor unnamed co-conspirators in the indictment. In most of the reported cases dealing with this subject matter, the statement of the co-conspirator sought to be introduced was of a co-conspirator who was either a co-defendant or named in the indictment as an unindicted co-conspirator for the same conspiracy for which the defendant was being tried.

Nonetheless, there is some support for the proposition that Federal Rule of Evidence 801(d)(2)(e) carries forward the almost universally accepted doctrine that a joint venturer is considered as a co-conspirator for the purposes of the rule even though no conspiracy has been charged. See, e.g., *United States v. Rinaldi*, 393 F.2d 97 (2d Cir. 1968), cert. den. 393 U.S. 913; *United States v. Spencer*, 415 F.2d 1301 (7th Cir. 1969). In *United States v. Nixon*, supra, this Court noted that declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and if the declarations at issue were in furtherance of that conspiracy. The Court also noted that "the same is true of declara-

tions of co-conspirators who are not defendants in the case on trial. *Dutton v. Evans*, 400 U.S. 74 (1970)." (That ruling was dicta, inasmuch as the issue before the Court was the power of the special prosecutor to subpoena certain tapes. The Court's analysis went to the possible relevancy and admissibility of said tapes in the event the subpoena was granted.) 418 U.S. at 701.

Thus, it is at least arguable that the co-conspirator need not be a co-defendant in the matter before the court. However, the basic assumption of all of the cases dealing with the application of the rule is that the conspiracy involved in the application of the rule is the very same conspiracy for which the defendant was being tried. In this case, Mr. Long was being tried for conspiracy to obstruct justice, whereas the alleged conspiracy between appellant and Messrs. Scarpino and Pruchnitzky had nothing to do with obstructing justice. Rather, if any conspiracy was shown at all by independent evidence or otherwise, it related to the crime of bribery. In effect, the court below extended the doctrine to apply to any and all conspiracies in which it is alleged the defendant may have been engaged prior to the matter at trial before the court. Thus, the court admitted into evidence an out-of-court declaration by an alleged co-conspirator made in the course of an alleged conspiracy to commit bribery in the trial of Long who was charged with conspiracy to obstruct justice by attempting to persuade others to testify falsely before the grand jury.

It is respectfully submitted that the rule has not and should not be extended to permit the introduction of such out-of-court declarations. In *Park v. Huff*, 493 F.2d 923 (5th Cir. 1974), the court held that the hearsay testimony introduced was not properly admitted under

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the federal co-conspirator exception where the only conspiracy in which the defendant's participation was independently proved, was an illicit liquor conspiracy and the defendant was on trial for a murder conspiracy. The ties between the liquor and the murder conspiracies were not tight, but at best, they were related by an overlap of membership and motive.

This same reasoning is particularly applicable to the case before the Court. It is to be remembered that there was very little independent evidence introduced against the petitioner. Nearly all of the government's evidence against him consisted of statements of co-defendant, Hackett, admittedly properly introduced under the co-conspirator exception to the hearsay rule, as set forth in Federal Rule of Evidence 801(d)(2)(e). Thus, Long's right of confrontation and cross-examination was basically limited to questioning Mr. Irvin as to whether he truthfully and completely remembered all of the statements made by the co-defendant, Hackett. There was obviously no opportunity to cross-examine co-defendant, Hackett, inasmuch as he asserted his Fifth Amendment privilege not to take the witness stand. For all practical purposes, the government established its entire case against Mr. Long based upon the statements of Mr. Hackett, who did not take the witness stand, and based upon the out-of-court declarations of Messrs. Pruchnitzky and Scarpino, who were also not subject to cross-examination. The entire transcript could be reduced but to a few pages if all but the direct and independent evidence against Mr. Long was eliminated from the trial.

It cannot be emphasized too strongly that it was a crucial part of the government's case to prove that the \$2,160.00 paid by Mr. Long to Mr. Hackett and Mr. Irvin

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on October 16, 1974, was not an isolated payment of money for raffle tickets (as contended by Mr. Long), but was, in fact, a sum of money equal to the monthly payments due for June, July, August and September. It is conceded that the government properly attempted to establish its theory of a monthly payment scheme by putting into evidence certain admissions and statements of the co-defendant, co-conspirator, Hackett, which were obtained, both after the search of his vehicle on October 16, 1974, and during his trip to and from the grand jury in November, 1974. Even though Long did not have the opportunity to cross-examine Mr. Hackett because of his assertion of his Fifth Amendment right, the statements of Hackett cannot be used to render admissible other hearsay evidence in the form of information conveyed to Mr. Irvin by other council members who did not testify at the trial and whose involvement, if at all, was in an independent conspiracy.

It must also be pointed out that not only were the envelopes introduced into evidence in written form, but also in typewritten form, thus compounding the effect of such hearsay information on the jury. In addition, the prosecutor strenuously argued to the jury on the basis of this hearsay testimony that a pattern of making payments or bribes on a monthly basis was established. Thus, it is obvious that the introduction of such testimony was prejudicial to petitioner Long.

As to all of that information on the envelopes which admittedly was not conveyed to Mr. Irvin by any person, it is respectfully submitted that there is no Rule of Evidence under which such evidence could have been properly admitted. At the very best, those notations reflected Mr. Irvin's personal opinion as to the nature and

Conclusion.

source of the payments. A non-expert witness' personal opinion is not proper or competent evidence. The notations reflecting that the payments were for the months of January, February, March, April and May were not supported by any testimony in the record and this information should not have been submitted to the jury.

CONCLUSION

For the reasons discussed above, petitioner Long requests a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

THOMAS A. LIVINGSTON

DENNIS J. CLARK

Attorneys for Petitioner Long

APPENDIX A**Opinion—District Court**

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 75-82

UNITED STATES OF AMERICA

v.

FRANCIS P. LONG and JOHN HACKETT

OPINION

SNYDER, J.

The Defendants were charged in a six count indictment with violations of Title 18 of the United States Code, Section 371 (conspiracy), Section 1502 (obstruction of justice), and Section 1623 (making a false material declaration to a grand jury, and/or perjury). After conviction by a jury, Defendants now contend the evidence was insufficient to support such convictions and that errors were committed by the Trial Judge requiring a new trial. The Motions will be denied.

The investigation began when Norman Irvin, a Councilman for the Borough of North Braddock, related to Special Agent Edward L. Stewart of the Federal Bureau of Investigation that payoffs were being made to members of the North Braddock Borough Council by Long Hauling Company, a garbage removal company

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which had a contract with the Borough. Investigation focused on whether there were violations of the Hobbs Act as an extortion (18 U.S.C. §1951) or of the Organized Crime Control Act of 1970 as bribery (18 U.S.C. §1961, *et seq.*) Stewart interviewed the nine Councilman and several other officials of the Borough during the summer of 1974 without success. On October 9, 1974, Stewart also interviewed Francis P. Long, the principal owner and operator of Long Hauling Company, who denied any kickbacks, payoffs, or bribes involving the garbage contract.

On October 15, 1974, Irvin informed Stewart that he and Councilman John Hackett had gone that day to see Francis P. Long and that a payoff was to be made the following day. On October 16th, Stewart provided Irvin with a body tape recorder and procured a search warrant for Irvin's vehicle. Stewart also supervised a physical surveillance of the Long Hauling Company premises. Photographs taken that date revealed the presence of Hackett at the Long Hauling Company with Irvin. After Hackett and Irvin left the Long Hauling Company premises, Stewart and other Agents stopped the vehicle, executed the search warrant and seized nine envelopes each containing \$240 in United States currency.

On several occasions after the seizure, Stewart attempted to reinterview Long and Hackett, and finally subpoenaed them for appearance before the Federal Grand Jury in Pittsburgh on November 1, 1974. He again provided Irvin with the body tape recorder to record conversations between Irvin and the Defendants prior to and after their grand jury appearances.

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In interviews with Stewart, Irvin further related that as early as January of 1974, Hackett had explained to him that each Council Member got \$50 a month for the garbage contract, and that he, Hackett, had previously received \$100 a month on the garbage contract, but this amount had been reduced because of the lower value of the new contract. Irvin further claimed he had received \$250 between March and May of 1974 from two North Braddock Council Members.

According to Irvin, on October 14, 1974, Hackett asked Irvin to drive him to Long Hauling Company in Duquesne to pick up money from Long which was to be distributed to the Council Members. On October 15, 1974, he and Hackett went to the premises of the Long Hauling Company and discussed the payment of the money with Defendant Long and after this first meeting they were to return the next day to collect the money from Long. The tape recordings reflect that upon the arrival of Irvin and Hackett at Long Hauling Company on October 16, 1974, Long stated "just open up the envelope. There is \$200 and two twenties, just check it there". Later, Long said "that straightens you up to October, see and then every two months you know . . . that's only 120 dollars" (the jury could well infer from this that the \$240 in the envelopes were payments to date). Tape recordings of conversations later that day further indicated that after the money had been seized, Hackett stated he would call Red Long to see if Red Long would go along with the story of the raffle tickets, and that Irvin and Hackett agreed to see Long the next day about it.

Irvin testified that when he and Hackett went to Long Hauling Company on the following day and ex-

plained that the FBI Agents had seized the nine envelopes, Long said "We are sunk. We are beat. We are finished." Hackett then explained to Long that the Democratic organization of the Borough of North Braddock was holding a raffle to raise money for the November elections and that there were tickets available which would cover the \$240 in each envelope. Irvin testified that Long asked if they thought it would work and further stated that he, Long, would have to check with his attorney to see "if it was legal and if it would work". Irvin testified that at that time he took two thousand raffle tickets¹ from his truck and gave them to Long stating that the additional one hundred and sixty tickets would be delivered the following day. True to his word, on October 18, Hackett delivered the one hundred and sixty raffle tickets² to Irvin's place of business and Irvin took them to Long. Irvin testified that Long again asked if he (Irvin) thought the raffle ticket story would work and Long stated "that if we all stick together and stick to the story, it will work."

The tapes and Irvin's testimony showed that on November 1, 1974, he and Hackett drove to Pittsburgh to appear and testify before the Federal Grand Jury. The conversation, as recorded, indicated that Hackett, in discussing the October 16 seizure, said "I just thought real quick, you know, I said that's for raffle

1. Hackett got these tickets from the Street Commissioner (Roman) who was holding them until a dispute among the Councilmen was resolved. On the way to the grand jury on November 1st, the tapes recorded Hackett as saying to Irvin "We're fortunate Roman had those 2,000 tickets."

2. These 160 tickets came from Hackett's own supply of tickets to sell.

tickets, Stewart. . . ." The tape of that conversation also revealed that Hackett said the Federal Bureau of Investigation could not break the \$240 in each envelope into monthly payments because "we wasn't getting \$60 a month, we were only getting \$50 . . . "cause Drabik was cutting himself in." (In his testimony, Irvin explained the discrepancy. Drabik, a former Councilman, was cutting himself in on the payments, unknown to Long. So Long was paying \$60 a month for each Councilman, but they were only getting \$50.)

Defendant Hackett presented no evidence at the trial and Defendant Long presented character witnesses as to his good reputation in the community for truthfulness and being a law abiding citizen.

I. VERDICT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT CONTRARY TO THE WEIGHT OF EVIDENCE

Defendants contend that the verdict rendered is contrary to the weight of the evidence and not supported by substantial evidence. The tests for legal sufficiency of evidence is whether the Government produced substantial evidence, taking the view most favorable to the Government. *United States v. Armocida*, 515 F.2d 29 (3d Cir. 1975); *United States v. Pratt*, 429 F.2d 690 (3d Cir. 1970). Our review of the evidence above indicates that there was sufficient evidence to support the jury verdict of guilty. In part, the jury had before it the physical evidence of the payoffs in the form of the nine envelopes each containing the \$240, the surprise expressed by Hackett upon being caught with the money in the nine envelopes, the attempts to invent the raffle ticket explanation, including even consultation with their attorneys on the matter and the failure to explain the odd number of 2160 tickets, delivered after pay-

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ment was made and in two different trips. All of this evidence formed a sufficient factual backdrop from which the jury could well find the guilt of both Defendants on each charge. The foregoing discussion also applies so this Court cannot say the jury verdict was contrary to the weight of the evidence.

II. THE ALLEGED ERRORS OF THE COURT

Defendants contend that this Court erred in admitting into evidence Government's Exhibits 1, 2 and 3, and Government Exhibits 1(a), 2(a) and 3(a). These exhibits were envelopes, the former having typewritten versions of Irvin's handwritten notations which appeared on the latter. The notation on the envelopes read as follows:

Exhibit 1A (Handwritten)

Jan. Long Hauling
 Received \$50.00 Monday 10 PM
 3-18-74
 from Jordan Scarpino
 10 P.M. Pickup Truck
 LONG

Exhibit 2A (Handwritten)

Long Hauling
 Thursday May 30th 1974 Garage
 11:10 AM
 Received \$100.00 from Don Pruchnitzsky
 April & May

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Exhibit 3A (Handwritten)

Long Hauling
 Feb & March \$100.00 Garage
 3:30 PM
 Received from Don Pruchnitzsky
 Monday 4-1-74

Exhibit 1 (Typed with handwritten notations)

Long Hauling Pickup Truck
 Monday March 18, 1974 10 P.M.
 Received \$50.00 from Jordan Scarpino
 Jan.

Handwritten Notations	}	559 Seddon Ave	JMM
		Pgh, Pa	7/15/74
		271-1717	183-14

Exhibit 2 (Typed with handwritten notations)

Long Hauling Garage
 Monday April 1, 1974 3:30 P.M.
 Received \$100.00 from Don Pruchnitzsky
 Feb. & March

Handwritten Notation	}	JMM
		7/15/74
		183-14

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Exhibit 3 (Typed with handwritten notations)

Long Hauling

Garage

Thursday May 30th 1974 11:10 A.M.
 Received \$100 from Don Pruchnitzsky
 April & May

Handwritten Notations	{	JMM	1314 Hancock
		7/15/74	North Braddock
		183-14	824-0347

Mr. Irvin testified at the trial that he received money, which he inserted into Government Exhibit 1(a) and kept in a drawer at home, from Councilman Scarpino and that Scarpino told him that it was from Long Hauling Company. Irvin noted this on the envelope along with certain other information which, although not conveyed to him by any other person, was based upon his belief that the money constituted payments for certain months. As to the Exhibits 2(a) and 3(a), he told of having received money from Councilman Pruchnitzsky on the dates shown and similarly putting it in envelopes on which he made notes. Irvin testified that he personally prepared these envelopes contemporaneously with the receipt of the money from the two Councilmen at the time, date, and place noted on the envelope. Under cross-examination, Irvin admitted that he had testified before two Federal Grand Juries that he received the first payment from Jordan Scarpino in February of 1974. However, the envelope prepared by Irvin at the time he received the money from Scarpino reflected that the payment was made in March of 1974. Both Defendants attacked inconsistencies in Irvin's prior testimony

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in attempts to impugn Irvin's credibility and impute serious motives to his conduct. In addition, it should be noted that Irvin testified that Hackett had explained to him prior to his receiving any cash payments from any other Councilmen that Borough Council Members had previously been receiving \$100 a month on the garbage contract but, due to the smaller amount of the new garbage contract, they were currently receiving only \$50 a month. Irvin also testified that Hackett told him "some of the boys were afraid to give him his share on the garbage contract". The \$50 a month figure reflected by Irvin's personal notations on the envelopes was corroborated by the tape recordings of the conversations between Hackett and Irvin. When Irvin asked Hackett if the Federal Bureau of Investigation could break down the money to \$60 a month, Hackett had explained that they were not getting \$60 but were getting \$50 because Drabik was cutting himself in. Accordingly, the \$250 received by Irvin during March, April, and May, according to the Government's theory constituted the \$50 due for the months of January through May. Thus, Long's statement that payments collected by Irvin and Hackett on October 16, 1974 "takes you up to October" clearly indicated that the envelopes contained the cash payments for June, July, August and September.

Therefore, the notations on the envelopes, as explained by Irvin, were highly relevant to the issues involved. Counsel for the Defendants seemed to admit this, for they object primarily to the fact that the information with respect to the receipt of the money from Scarpino and Pruchnitzsky was hearsay. The trouble with this is that Irvin himself testified that he had received the money from Scarpino and Pruchnitzsky and this was

therefore not hearsay. Their statements that the money was from Long Hauling Company was within the limitations of admissibility of statements of co-conspirators to those made "during the course and in the furtherance of the conspiracy" as set forth in Federal Rules of Evidence 801(d)(2)(E). Such statements have been admitted even though no conspiracy was charged. *United States v. Richardson*, 477 F.2d 1280 (8th Cir. 1973). In *United States v. Olweiss*, 138 F.2d 798 (2nd Cir. 1943), cert. denied 321 U.S. 744, 64 S.Ct. 483, 88 L.Ed. 1047 (1944), Judge Learned Hand relied on the rule as set forth by the Supreme Court in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249, 38 S.Ct. 65, 72, 16 L.Ed. 260 (1917) which stated:

"The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in the furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them."

Here, the evidence of concerted action between the various councilmen and Long was amply demonstrated. That being so, the statements of Scarpino and Pruchnitzsky that the money came from Long was clearly admissible. See also *United States v. Williams*, 435 F.2d 642 (at p. 645), (9th Cir. 1970). In any event in the light of Irvin's testimony as to this whole matter, any claimed error would have been harmless.

It is also alleged that the Court erred in denying Defendants' Motion for the Withdrawal of a Juror when the prosecutor elicited information from Irvin that the Defendant Long was "still paying off" to the municipalities of North Braddock, Rankin, Munhall, and Homestead. No further information was available to the Government as shown in evidence concerning whether said "payments" were legal, although the implication was clear that the "paying-off" was not legal and thus there was conveyed to the jury a possible criminal activity on the part of the Defendant Long, which criminal activity was over and above charges of perjury and obstructing justice being heard by the Court. However, as stated at the time of the Defendants' objections, such testimony was held admissible to show the motive, intent, and knowledge, the plan or design, and that the story of the Defendants concerning the "raffle tickets" was a contrived explanation for the money in the envelopes rather than being the truth of the situation. The government was thus entitled to indicate or suggest to the jury that the Defendant Long was here knowingly engaged in criminal activity and that the payment was part of a design or course of conduct with which the Defendant Long was very familiar.

III. THE CHARGE OF THE COURT

The Defendants first complain that the Court erred in charging the jury to the effect that the "crux of the case" is whether the initial transaction involved the sale of raffle tickets when the crux of the case was whether "the defendant Francis P. Long did in fact make 'bribes or payoffs' to councilmen of North Braddock Borough". We must constantly keep in mind that this was not a case charging bribes or payoffs to councilmen but, to

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the contrary, involved obstruction of justice for lying about the situation. If that jury believed that in fact the money was given for raffle tickets, then the obstruction of justice and all the rest of the Government's case fell because their answers would have been truthful and there would have been no basis for a guilty verdict. In considering the charge as a whole, as we are required to do, it is apparent that the Court's Charge was correct in focusing on the true purpose of the payment of the money.

The Defendants next contend that the Court erred in refusing to charge the jury, as requested, that they could not be found guilty of the charge of perjury unless or until the jury had first found beyond a reasonable doubt that Francis P. Long had, in fact, engaged in "bribery or payoffs" with the Councilmen of North Braddock Borough. At first, the statements seem to present a correct charge for the jury to consider. But it was not charged in this case that the Defendants were guilty of bribery or payoffs, and the Charge of the Court correctly focused upon the indictment charges of obstruction of justice and perjury, explaining very carefully to the jury exactly what the various terms meant.

Defendants, without merit, further contend that undue emphasis was placed around the raffle ticket story by reading a portion of the indictment to the jury pertaining to the alleged fabrication of a "cover story". An analysis of that use of the indictment shows that it was brought to the attention of the jury solely so they could focus on the exact charges in this case. The same may be said as to the Court's definitions of "payoffs" and "kick-backs" which, although the Circuit has indicated are not words of art, are still words which were necessary to be

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defined for the jury for their proper consideration of factual issues involved in the specific charges set forth in this indictment.

The final allegation was that the Court erred in admitting Government Exhibits 1 through 38 before the testimony of Norman Irvin and without proper foundation. Agent Edward Stewart's testimony had laid proper foundation for the admission of all of these Exhibits, and thus there was no error in admitting them. Furthermore, Norman Irvin testified at length and the Defendants can show no prejudice by their admission.

An appropriate Order will be entered.

DANIEL P. SNYDER

United States District Judge

Dated: November 3, 1976

cc

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Appendix A.

Order of Court dated November 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

FRANCIS P. LONG

JOHN HACKETT

Criminal Action
No. 75-82

ORDER OF COURT

AND NOW, to-wit, this 2nd day of November, 1976,
after due consideration and for the reasons set forth in
the Opinion filed simultaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
the Motions for New Trial filed by Defendants, Francis
P. Long and John Hackett be and the same are hereby
denied.

DANIEL P. SNYDER
United States District Judge

CC

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Appendix B.

APPENDIX B

Opinion—Court of Appeals

UNITED STATES of AMERICA

v.

Francis P. LONG, a/k/a "Red", John
Hackett, a/k/a "Jack", Appellant.

No. 76-2508.

United States Court of Appeals,
Third Circuit.

Argued Oct. 21, 1977.
Decided March 6, 1978.

Robert J. Cindrich, McVerry, Baxter, Cindrich,
Loughren & Mansmann, Pittsburgh, Pa., for appellant.

Blair A. Griffith, U. S. Atty. by Edward J. Schwab-
enland, Asst. U. S. Atty., Pittsburgh, Pa., for appellee.

Before ADAMS and GARTH, Circuit Judges, and
LACEY,* District Judge.

OPINION OF THE COURT

LACEY, District Judge.

Appellant Long was convicted by a jury in the Dis-
trict Court for the Western District of Pennsylvania of
conspiracy, obstruction of justice, and making a false
material declaration to a grand jury (perjury), in viola-
tion of 18 U.S.C. §§ 371, 1502-1503 and 1623, respectively.

*Frederick B. Lacey, United States District Judge,
District of New Jersey, sitting by designation.

Long was sentenced to thirty days' imprisonment on the conspiracy count and received a suspended sentence and three years' probation on the remaining counts. Additionally, he was fined \$25,000 and costs.

On appeal, Long makes three contentions.¹ Two of his arguments, that probable cause to issue a search warrant was lacking and that certain envelopes which contained written notations were improperly admitted into evidence at trial (Arguments II & III), we find to be totally without merit, and require no discussion. Long's other contention is that evidence of other crimes, i. e., payoffs, was improperly admitted into evidence at trial because its probative value, if any, was substantially outweighed by its prejudicial effect. See Fed.R. Evid. 403.² This claim too we find without merit; how-

1. Appellant formulated his arguments on appeal as follows:

I. The District Court erred in denying appellant's motions for withdrawal of a juror based upon the introduction of evidence of other alleged criminal activity.

II. The District Court erred in admitting hearsay evidence in the form of documents and testimony.

III. This District Court erred in denying appellant's motion to suppress illegally seized evidence because the facts set forth in the affidavit to the search warrant do not establish probable cause, in that those facts were based upon the uncorroborated statements of an unnamed informant whose reliability was not properly established.

2. Fed.R.Evid. 403 reads as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ever, given the concurring opinion's analysis of the issues involved, a review of the evidence and of Rules 103, 403 and 404(b) of the Federal Rules of Evidence is appropriate.

THE EVIDENCE

On this appeal, we must view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

The evidence of Long's guilt was overwhelming. Thus the jury heard evidence to the following effect: on October 16, 1974 Long, a garbage contractor, met with two North Braddock, Pennsylvania, councilmen, Irvin (who had been recently elected) and Hackett (a veteran of the political wars in the North Braddock area). Long and Hackett were unaware that Irvin had become an F.B.I. informant, that he had advised Special Agent Stewart of the F.B.I. that he and Hackett would receive a bribe from Long at this meeting, and that he, Irvin, had been furnished and was wearing at this meeting a concealed tape recorder which recorded the entire conversation.³

3. Irvin, newly elected to the North Braddock Council (App. 197a), had learned as early as March 1974 that Long had been paying off North Braddock councilmen. App. 201a-204a. In May 1974 he reported this fact to the local police chief who referred him to Special Agent Stewart; thereafter, Irvin cooperated with Stewart because "he didn't think it was right" (i.e., councilmen getting pay-offs). App. 279 a.

Pretrial motions to suppress the tapes had been denied. App. 2a.

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That the pay-off was made, just as Irvin had predicted, is reflected by the recording of the October 16 conference, played for the jury without objection.⁴

The cash was divided into nine envelopes (one for each councilman), and Long was heard to suggest that a "sticker" be put on them "so we'll know that nobody touched it. . . ." App. 227a-228a. Long, obviously referring to the cash he had delivered to Irvin and Hackett, then implicates himself in the pay-off scheme when he is recorded as saying: "So that straightens you up to October, see and then every two months you know. . . . It's only \$120."⁵ App. 229a.

Since Irvin and Hackett were stopped and searched, pursuant to a search warrant, by the F.B.I. immediately after leaving Long, and relieved of the nine envelopes and the cash he had given them, the defendants had to

4. Thus Long is heard to say (App. 227a): "Just opened [sic] up the envelope, there's two \$100 bills and two \$20, just check it there. I told Malley I couldn't get that when you first called."

5. Hackett and Long were tried together. As a part of its case the government read to the jury the November 1, 1974 grand jury testimony of each. In the grand jury proceeding, the prosecutor embodied in a question to Hackett the language used by Long (App. 408a):

Q. Now, isn't it a fact that the \$240 was a payment to the councilmen of North Braddock, nine envelopes, one for each councilman containing \$240, which would bring them up to date for their payoffs from the hauling until October?

Hackett answered: "No."

His response is contradicted by the recording.

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and did admit that on October 16 Long had given Hackett and Irvin a total of \$2,160.⁶

Hackett, so the events (and the tapes) reveal, was a quick thinker.⁷ He immediately formed the "cover" story that Long had agreed to buy a total of 2,160 raffle tickets, evenly divided, from the nine councilmen. Unfortunately for him (and Long), their scheme was being memorialized on Irvin's body tape recorder.

Thus the jury heard Hackett tell Irvin that the "cover" story was weakened by the "odd" figure, \$2,160, and the "9 envelopes," but "Red" (i. e., Long) "would say that he always gives us money . . . for each election." App. 241a. Hackett then tells Irvin that he will speak to Long. App. 244a. The jury also hears Hackett state to Irvin (App. 246a): "I had a feeling not to take that money. . . ."

Within two days after the F.B.I. search, and in two separate deliveries, 2,160 raffle tickets were delivered to Long. The first delivery of 2,000 was by Hackett and Irvin. The following day Hackett's son delivered 160 tickets to Irvin who in turn delivered them to Long. Ac-

6. Hackett was obviously unaware of Irvin's cooperation with the F.B.I. Thus, immediately after the search, as he wonders how the F.B.I. had been "tipped," he opines that "[w]e shouldn't a said anything to anybody last night, huh." App. 240a-241a.

7. Hackett, on November 1, 1974, was recorded by Irvin as stating (App. 257a): ". . . I had mentioned it to Stewart when he grabbed that money, I said that's the ticket money, I just thought real quick, ya know . . ." (emphasis supplied).

according to Irvin's testimony, Long agreed to go along with the contrived tale.⁸

The defendants and Irvin, who was still secretly cooperating with the F.B.I., went before a federal grand jury on November 1, 1974.

The body recorder, which had not functioned on October 17 and thereafter, was once again concealed on Irvin's person and was recording as he and Hackett drove to the federal courthouse for their grand jury appearances. The recording of this conversation was played for the jury, again without objection.

Thus the jury heard Hackett relate to Irvin that the day before (October 31) he, Hackett, had met with Long and counsel "from 12 o'clock till about a quarter after one." One of the participants was described by Hackett as "one of the best criminal attorneys."^{8a} App. 258a. The jury then heard Hackett describing what had occurred at the meeting as he and Long were being prepared for their grand jury appearances, with Hackett quoting Long (App. 260a) as the latter reviewed the raffle ticket story at this meeting.

Hackett then states to Irvin (App. 260a): "We're fortunate Roman had those 2,000 tickets."

The recording thereafter reflects Hackett advising Irvin how to handle before the grand jury his own part

8. On October 17, 1974 when Hackett and Irvin told Long of the F.B.I. seizure on the previous day, Long stated, according to Irvin (App. 251a): "... we were finished. We were beat. We were sunk and he never should have never [sic] given us the money in the beginning."

8a. Long's attorney at trial and on appeal was not counsel to Long at this pre-indictment stage.

in the plot. App. 260a-265a. In what was obviously an attempt to keep Irvin "in line," Hackett warns him (App. 265a): "... If they've been getting it for fifteen years and you've been getting it for one month, you're just as guilty as they are."

Hackett's callousness is exemplified by his stating to Irvin (App. 270a): "Wish we was [sic] in criminal court, we'd have the fix in already."

By his own words, as replayed for the jurors, Hackett stood before them guilty as charged. His grand jury testimony was read to them (App. 395a-448a) after they had heard the recordings and Irvin's testimony, which reinforced and supplemented the recorded material. Hackett's grand jury testimony faithfully follows the scenario he had unwittingly placed on Irvin's tape recorder, on November 1, preceding the grand jury appearances.

Once Hackett's defense crumbled, Long too was doomed in view of the interlocking of their "raffle ticket" explanations. This point is eloquently made by the fact that, while the recording of the October 16, 1974 meeting demonstrated that the subject of raffle tickets was never mentioned or discussed, the jury heard Long, in his grand jury testimony, state that it was. App. 371a-394a. Added to the jury impact of this bald inconsistency is the description of the October 31 meeting, as embodied in Hackett's recorded conversation with Irvin on November 1, implicating Long in the cover-up. Thus Long, like Hackett, could have escaped a guilty verdict only through a gross miscarriage of justice.

THE CHALLENGED TESTIMONY

The testimony which is the subject of the claim of trial error was given by Irvin, as follows:

- Q. Now, on November 1, 1974, did you have lunch while waiting to go to the Grand Jury?
- A. Yes, I did.
- Q. Who was present at that lunch?
- A. Mr. Pruchnitzsky and Mr. Long.
- Q. During that lunch, what conversation if any, did you have with Mr. Long concerning garbage contracts?
- A. He told me at lunch that day, that he was still paying off in Duquesne, Munhall, Homestead and Rankin.

Mr. Cindrich: This is objected to. That is not a proper place in this trial.

The Court: Objection overruled.

By Mr. Roark:

- Q. What was the conversation?
- A. He said he was still paying off in the Boroughs of Duquesne, Munhall, Homestead and Rankin.
- App. 278a-279a.

DISCUSSION

To ascertain whether the admission of this challenged testimony amounted to reversible error, our analysis begins with Rule 103(a) of the Federal Rules of Evidence.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .

This Rule incorporated the concept of harmless error. Given the overwhelming evidence of Long's guilt, we have no hesitancy in stating that, assuming arguendo that trial judge improperly admitted the challenged evidence, no "substantial right" of Long was "affected" and reversal would thus be unwarranted.

Next, we consider whether the admission of the challenged matter was error. The Federal Rules of Evidence require objecting counsel to be "specific" in stating grounds for an objection. Rule 103(a)(1). The reason for this is obvious. The trial judge is thereby alerted to the issue raised by the objection.

Long's lawyer made what was anything but a specific objection to the evidence in question.⁹ Charitably, it may be said that, as later supplemented by him (App. 280a), his objection added up to a claim that the testimony lacked relevancy under Fed.R.Evid. 404(b).¹⁰ The trial judge found it relevant. We do as well.¹¹

9. The objection, which came after the answer was in, was: "This is objected to. That is not a proper place in this trial." (App. 279a). Long's counsel referred to no federal rule of evidence, raised no hearsay objection, and did not claim that the evidence was unreliable.

10. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

11. Fed.R.Evid. 401 provides what is a very low threshold of relevancy:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

Rule 404(b) does nothing more than restate what has long been the law of this Circuit, as enunciated pre-Rule, for example, in *United States v. Stirone*, 262 F.2d 571 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), that "evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime." 262 F.2d at 576.

Thus it can be said that the law of this Circuit, pre-Rule 404(b), favored admissibility of "other crime" or probably or less probable than it would be without the evidence."

Given the advantage an appraisal by hindsight affords, we would have found particular relevancy under Fed.R.Evid. 401 in the light this testimony cast upon Long's state of mind (i.e., knowledge and wilfulness) when he went into the grand jury room and, when asked (App. 374a): "How long have you been making payoffs or bribes to councilmen of North Braddock in return for the garbage contract that you have?", he responded: "I have never been paying off any bribes to any community that I am doing business with." The Indictment embodies the specific question and answer in Count IV, charging Long with lying to the grand jury.

See *United States v. Kopel*, 552 F.2d 1265 (7th Cir. 1977), where, convicted of extortion and perjury, the appellant argued unsuccessfully to the Court of Appeals that the government improperly introduced transcripts of a grand jury proceeding showing that appellant consulted with his attorney prior to answering the crucial questions which were the subject of the perjury counts. The court concluded, over the dissent of one judge, that evidence showing the consultation tended to prove that Kopel's statements were made in a deliberate fashion rather than as the result of inadvertence and mistake. Citing Rule 403, the court found the evidence to be far more probative than prejudicial.

"bad act" evidence unless it could be said that it was being offered solely to show that a defendant had criminal propensities. Our approach put us with those jurisdictions which favored admissibility of such evidence (the "inclusionary" approach). Other jurisdictions took the opposite position, that such evidence was inadmissible unless it bore indicia of relevance (the "exclusionary" approach). Thus, where one came out depended upon where one went in. See *Stone, The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv.L.Rev. 988 (1938).

This Circuit's pre-404(b) approach to "other crime" evidence is seen not only in *Stirone*, *supra*, but also in *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977); *United States v. Chrzanowski*, 502 F.2d 573 (3d Cir. 1974); and *United States v. Todaro*, 448 F.2d 64 (3d Cir. 1971), *cert. denied*, 404 U.S. 1040, 92 S.Ct. 724, 30 L.Ed.2d 732 (1972).

The draftsmen of Rule 404(b) intended it to be construed as one of "inclusion," and not "exclusion." They intended to emphasize admissibility of "other crime" evidence. This emerges from the legislative history which saw the "exclusionary" approach of the Supreme Court version of Rule 404(b) modified. Thus the Supreme Court's final formulation, after prohibiting evidence of other crimes to prove the character of the defendant, had provided that "this subdivision does not exclude the evidence when offered for other purposes such as" The list of exceptions followed. 56 F.R.D. 183, 219 (1972).

As finally adopted by Congress, however, the words are: "It may, however, be admissible for other purposes

such as" The House Committee on the Judiciary explained that this placed "greater emphasis on admissibility than did the final Court version." H.R.Rep.No. 650, 93d Cong., 1st Sess. (1973), *reprinted* in 4 U.S.Code Cong. & Ad.News, pp. 7075, 7081 (1974).

That the Senate Committee on the Judiciary felt the same is shown by its statement that, "with respect to permissible uses for such evidence [i. e., 'other crimes,' etc.], the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i. e. prejudice, confusion or waste of time." S.Rep.No.1277, 93d Cong., 2d Sess. (1974), *reprinted* in 4 U.S.Code Cong. & Ad. News, pp. 7051, 7071 (1974).

Given this approach, we have no difficulty in finding the evidence in question of substantial relevance, *see* 765, n. 11, *supra*, under Rules 404(b) and 401.

The concurring opinion takes the trial judge to task for not engaging in a neat scholarly balancing as required by Fed.R.Evid. 403, and then, doing its own Rule 403 balancing, concludes the evidence should have been barred. As to this, two comments are in order. As the concurrence recognized, Long's counsel never invoked Rule 403, that is, he never stated that, even if the material objected to had probative value, it was "substantially outweighed by the danger of unfair prejudice." Since the "specific" objection requirement of Fed.R. Evid. 103(a) was not complied with, the trial judge was not required to deal with Rule 403. Moreover, the dynamics of trial do not always permit a Rule 403 analysis in the detail the concurrence suggests as appropriate. While a trial judge can be helpful to an appellate court if he spells out for it such an analysis, to require a detailed balancing statement in each and every case is

unrealistic. Where an objective does invoke Rule 403, the trial judge should record his balancing analysis to the extent that his exercise of discretion may be fairly reviewed on appeal.¹² However, where Rule 403 is not invoked, the trial judge's balancing will be subsumed in his ruling.

We turn now to the Rule 403 balancing of the concurrence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.

As Judge Weinstein pointed out (1 Weinstein & Berger, *Weinstein's Evidence*, at ¶ 403[01], 403-4), Rule 403, as proposed by the Supreme Court read as follows:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

(a) *Exclusion Mandatory*. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(b) *Exclusion Discretionary*. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

12. The concurrence thus misinterprets our holding. Contrary to the suggestion of the concurrence, we do not "maintain . . . that the trial judge need not set forth the reasons for his action so long as his ruling cannot be characterized as irrational or arbitrary . . ." (*see* 768, *infra*); nor do we hold "that the trial judge need only state that the admitted material is 'relevant' in order to comply with Rules 403 and 404." (*See* 772, *infra*.)

The same treatise points out that under subdivision (a) of the original formulation, the judge, under certain conditions, had to exclude the evidence, whereas under subdivision (b) exclusion rested upon exercise of the court's discretion. *Id.* at ¶ 403[02], 403-12.

In view of the revision made by Congress, and the use of "may" in the final version of Rule 403, it is manifest that the draftsmen intended that the trial judge be given a very substantial discretion in "balancing" probative value on the one hand and "unfair prejudice" on the other, and that he should not be reversed simply because an appellate court believes that it would have decided the matter otherwise because of a differing view of the highly subjective factors of (a) the probative value, or (b) the prejudice presented by the evidence. This inference is strengthened by the fact that the Rule does not establish a mere imbalance as the standard, but rather requires that evidence "may" be barred only if its probative value is "substantially outweighed" by prejudice. The trial judge, not the appellate judge, is in the best position to assess the extent of the prejudice caused a party by a piece of evidence. The appellate judge works with a cold record, whereas the trial judge is there in the courtroom.

A reversal based upon appellate disagreement with the trial judge's balancing under Rule 403 necessarily must be founded upon highly subjective reasons, which, experience teaches us, are not always readily recognizable or definable. The dangers inherent in not understanding this are exemplified in the recently decided *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*), affirming a conviction, and vacating the pre-

vious panel decision, 544 F.2d 611, which had reversed the conviction.

The *en banc* court discussed the question of "what standard of review is to be applied" to Rule 403 rulings of a trial judge. The vacated panel decision had found the admission of certain evidence to be error and grounds for reversal because its probative value was, in the words of Rule 403, "substantially outweighed by the danger of unfair prejudice." The full court took a different view, aided in so doing by the standard of review it adopted, namely, that the trial judge will be upheld "unless he acts arbitrarily or irrationally." 560 F.2d at 515. Cited in support of this view is *Construction Ltd. v. Brooks-Skinner Building Co.*, 488 F.2d 427, 431 (3d Cir. 1973).¹³

Because the trial judge here did not abuse his discretion in admitting the evidence in question, and for the further reason that, even if he did, the evidence of appellant's guilt is so overwhelming that the alleged error did not affect a "substantial right," Long's judgment of conviction will be affirmed.

ADAMS, Circuit Judge, concurs.

ADAMS, Circuit Judge, concurring.

13. Thus this Court in *Construction, Ltd.* stated:

The task of assessing potential prejudice is one for which the trial judge, considering his familiarity with the full array of evidence in a case, is particularly suited. . . . The practical problems inherent in this balancing of intangibles—of probative worth against the danger of prejudice or confusion—call for the vesting of a generous measure of discretion in the trial judge. Were we sitting as a trial judge in this case, we might well have concluded that the potentially prejudicial nature of the

1.

I concur in the result reached by the majority. However, my concern regarding an important and recurring issue in the administration of criminal justice prompts me to set forth my views separately.

My difference with the majority stems from a divergence of perspectives on the process by which a trial court must evaluate attempts to admit concededly prejudicial evidence of prior misdeeds against a defendant in a criminal case. Because of the expansive scope of the threshold concept of "relevance" under the Federal Rules of Evidence¹ the trial judge's duty to balance the probative value of proffered evidence against its potential for prejudice is an essential safeguard to the fairness of criminal trials.² In performing that duty under the Federal Rules of Evidence, I believe the trial judge must articulate his weighing of those two factors. To maintain, as the majority appears to suggest, that the

evidence . . . outweighed its probative worth. However, we cannot say that the trial judge abused his discretion in reaching the contrary conclusion.

This was, of course, a pre-Rules case. Rule 403 did not change the old and well-known "prejudice" rule under which *Construction, Ltd.* was decided, nor has it changed the standard we applied in *Construction, Ltd.*

1. F.R.Evid. 401 reads:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or; less probable than it would be without the evidence.

2. F.R.Evid. 403. The Advisory Committee's Note to Rule 401 states that the broad sweep of Rule 401 is to be "limited by the exclusionary principles of Rule 403."

2.

trial judge need not set forth the reasons for his action so long as his ruling cannot be characterized as irrational or arbitrary is not deference to the admitted discretion of the trial court, but a refusal to assure that such discretion is in fact exercised.

From the evidence produced at trial it would appear that Francis Long, the appellant here, was involved in a scheme to obtain garbage collection contracts for his company from a number of boroughs in the western part of Pennsylvania by offering kick-backs to councilmen in such boroughs. There is also evidence that when pay-offs in the Borough of North Braddock became the subject of a grand jury investigation, Long and his associate, John Hackett, attempted to fabricate a story that would explain, in non-criminal terms, their payments to the councilmen.

It was this latter aspect of their conduct which gave rise to the specific charges leading to this appeal. Long and Hackett were not indicted for bribing borough councilmen, but for lying before and conspiring to mislead a grand jury that was investigating the alleged bribery. More particularly, Long was charged with falsely denying before a grand jury his bribery of a North Braddock official. Additionally, the indictment charged Long with conspiring to "corruptly influence" a grand jury witness, and conspiring to suborn perjury in an effort to cover up his alleged bribery.

The FBI conducted its investigation by persuading Irvin, a North Braddock Borough councilman, to wear a body recorder while meeting with Long and Hackett. As a result of the information secured in this manner

by the recorder, the evidence of Hackett's participation in the bribery, obstruction of justice, and conspiracy was overwhelming. Hackett's own recorded comments went far in establishing his guilt, and he was convicted.

The evidence against Long, however, was less convincing, for no damaging admissions out of his own mouth were captured on tape. Indeed, this must have been the perception of the prosecution, because in Long's trial for lying to the grand jury the prosecutor sought to elicit from Irvin, the informant, a statement that Long had told Irvin of on-going bribery efforts in four surrounding boroughs.³

Long's counsel objected to this testimony on the ground that "[evidence of] prior bad acts . . . is not admissible in a trial of a defendant." (280a) In the course of his objection, however, Long's counsel did not specifically mention either Rule 404(b) or Rule 403 by number.

The trial judge overruled the objection on the basis that the evidence was relevant to establish "a common scheme" (281a), and to prove that Long "knows what a payoff or kickback is." (282a) He did not, however, weigh the relevancy against the prejudice that such evidence might engender in the minds of the jury.

3. The testimony proffered was that Long had said to Irvin that Long "was still paying off in Duquesne, Munhall, Homestead, and Rankin." While this indirect testimony is not objectionable "hearsay" within the meaning of the Federal Rules of Evidence, since Long is a party to the proceeding (F.R.Evid. 801(d)(2)), it nonetheless carries with it a number of the factors which militate against placing reliance upon hearsay.

3.

To determine whether the ruling by the trial judge in admitting this evidence constituted reversible error, my analysis begins with the precepts embodied in Federal Rule of Evidence 404(b).⁴ That rule provides that testimony regarding other wrongs may not be used to show a propensity to perpetrate the wrongs at issue, and that an accused should not be subject to conviction on the basis of crimes with which he is not charged.⁵ Closely associated with such salutary principles is the proposition that even when introduced for another relevant purpose, evidence of other criminal misconduct will frequently carry with it a danger that the jury will draw the forbidden inference that a person who has committed criminal acts once, is likely to do so again.

Potential for prejudice was especially great in the case at hand. One of the offenses charged is not a substantive crime, itself, but a conspiracy to commit a substantive crime, namely, obstructing justice by misleading a grand jury about still another substantive crime, bribery. Evidence of yet a third crime—another effort at bribery similar to the crime allegedly concealed—may well cause, indeed invite, the jury to focus atten-

4. Rule 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

5. See e. g., *United States v. Cook*, 538 F.2d 1000, 1003-1004 (3d Cir. 1976); *United States v. James*, 181 U.S.App.D.C. 55, 555, F.2d 992, 1000-1001 (1977); *United States v. Beechum*, 555 F.2d 487, 507-509 (5th Cir. 1977).

tion on the defendant's culpability for "bribery" in general. This is so for it is the defendant's proclivities to bribe—not the specific crimes of perjury and obstructing justice presently before the jury—to which the evidence in question is most directly relevant. To admit testimony regarding other alleged bribes might well encourage the outcome which Rule 404(b) seeks to avoid: conviction on the basis of "guilt by reputation."⁶

There is no doubt that the Federal Rules of Evidence were not designed to deprive the trial courts of their discretion. Such discretion is most important, because a trial judge is in an advantageous position to ascertain the climate of the trial and to appraise the impact of the prejudicial material. Nonetheless, the safeguard provided by the Federal Rules against prejudicial use of evidence is established by requiring a balancing of the probative value of the tendered material, on the one hand, and its potential for prejudice, on the other, before determining whether it is appropriate to

6. See e. g. *United States v. Cook*, 538 F.2d 1000, 1004 (3d Cir. 1976); quoting *Govt. of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976).

7. Federal Rule of Evidence 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...."

The Advisory Committee's Notes to Rule 404(b) state that where the evidence of prior bad acts is offered for a permissible purpose,

"[t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403." See *Govt. of the Virgin Islands v. Felix*, 569 F.2d

allow it to be submitted to the jury.⁷ In this regard, we recently stated:⁸

Because the weighing entails competing interests, it is delicate and must be employed with care, lest accommodation to the prosecutor's needs result in subverting a principle that is central to our concept of fairness.

I am somewhat troubled because the protection which Rule 403 attempts to establish may have been disregarded in the case before us. Since no balancing took place, at least none which is set forth on the record, it is difficult to determine whether there has been an exercise of discretion or a mistake.

1234 at 1279-1280 (3d Cir. 1978); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632 at 635 (3d Cir. 1977); *United States v. Cook*, 538 F.2d 1000, 1003-04 (3d Cir. 1976); *United States v. Robinson*, 174 U.S.App.D.C. 224, 530 F.2d 1076, 1081 (1976).

Even before the Federal Rules, the standard in this Circuit was phrased in these terms:

Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime.

Of course, the trial judge may, in the exercise of his sound discretion exclude evidence which is logically relevant to an issue other than propensity, if he finds that the probative value of such evidence is substantially outweighed by the risk that its admission will create a substantial danger of undue prejudice.

United States v. Stirone, 262 F.2d 571, 576 (3d Cir. 1958) *rev'd on other grounds* 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

8. *United States v. Cook*, 538 F.2d 1000, 1004 (3d Cir. 1976). See *Govt. of the Virgin Islands v. Felix*, 569 F.2d 1274 at 1279-1280 (3d Cir. 1978).

The explicit weighing which Rule 403 mandates need not, of course, be as extensively articulated as the balancing in which this concurring opinion engages. Evidentiary decisions most often are made in the course of a trial, and extensive explication might unduly delay the proceedings. Nonetheless, the record should reflect some reckoning of the balance between relevance and prejudice and the alternatives available for the substitution of less prejudicial proof. Such reasoned adjudication is the cornerstone of the legitimacy of the actions of the judiciary, and an essential safeguard of the proper exercise of the trial court's broad discretion.⁹

4.

Evidence that Long engaged in other bribery schemes—in this case evidence of hearsay quality—was of limited relevance to the specific issues before the jury. Certainly this is true if our inquiry is limited to the reasons addressed by the trial court. The district judge declared that he admitted the evidence to “show part of the general plan or scheme.”¹⁰ Apparently he believed that the allegation that Long may have sought to bribe other borough councils was relevant to the issue being tried. Yet, as the trial judge recognized, the case being

9. As Justice Frankfurter stated in a different context:

That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached.

Joint Anti Facist Refugee Committtee v. McGrath, 341 U.S. 123, 171, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

10. 281a.

tried “ha[d] to do with obstruction of justice and perjury before the grand jury,”¹¹ not bribery in Duquesne, Munhall, Homestead and Rankin. Any conclusion that the “payoffs” referred to in the challenged testimony were part of a common scheme to commit perjury before the grand jury or to obstruct that body's inquiry would appear to be speculative.¹²

The trial judge also suggested¹³ that the objectionable evidence rebutted an implication planted during the cross-examination of a prior witness¹⁴ to the effect that Long's denial of “payoffs” might have been confused by a misapprehension as to the meaning of that term. However, the possibility of Long's confusion regarding the meaning of the word “payoffs” would not appear to be negated by the testimony in question here: that Long had said that he was “paying off” other city councils. Long may have been equally confused in making the latter utterance.

Even if a reviewing court is not limited to the reasoning articulated by the trial judge, the probative value of the questioned testimony remains marginal. The prosecution's terse invocation of the purpose of showing “intent, motive and knowledge”¹⁵ as the basis for the relevancy of the testimony guides attention only to minimal probative worth. Taking the facts to be as the prosecution represented them, Long might be said to have had

11. *Id.*

12. *Cf. United States v. Klein*, 515 F.2d 751, 755-56 (3d Cir. 1975).

13. 282a.

14. *Id.* at 160a-162a.

15. Appendix p. 281a.

Appendix B.

a motive for concealing his misdeeds in North Braddock from the grand jury: *i. e.*, avoiding prosecution for his misconduct in North Braddock. But the fact that Long may also have hidden other misconduct, even if proven, adds little to the prosecution's case as to Long's motive for lying to the grand jury. Similarly, it seems that Long's knowledge and intent regarding his statements to the grand jury on the subject of his actions in North Braddock were illumined only to a limited extent by his alleged comments to Irvin, the informer, about activities in four surrounding boroughs.

Concern that potential prejudice substantially outweighed any probative value is heightened by the use that the government ultimately made of the testimony at issue. Thus, in his closing, the prosecutor did not refer to the prejudicial evidence as it bore on intent, motive or any of the other grounds set forth when the prosecution urged the inclusion of the testimony. Instead, the prosecutor invited the jurors to consider the evidence in question primarily as it touched on Long's character.¹⁶ The

16. The prosecutor's comments were:

Now, what did Mr. Long say to Norm Irvin at lunch? What do you recall about that testimony? Mr. Irvin, as I recall it, said the defendant, Long told him at lunch, I am still paying, still paying; Rankin, Munhall, Duquesne and Homestead. I am paying there. Does that mean that he is still paying there but he is not paying in North Braddock because the heat is on? That is something for you to think about.

* * * * *

Mr. Cindrich talked about presumption of innocence. Mr. Wedner talked about presumption of innocence. Mr. Cindrich talked about a reasonable doubt. Mr. Wedner talked about a reasonable doubt. But, you must follow the law given to you by the Court.

Appendix B.

defendant was to be convicted, according to the prosecutor, because his activities in Duquesne, Munhall, Homestead and Rankin were socially pernicious. The judge's charge did not remedy this state of affairs, for it left unclear the purposes for which the jury could consider the testimony.¹⁷

But, there are other foundations and other pillars upon which our country is built and one of those is a government of the people, by the people, for the people. Not in the back rooms at Long Hauling Company and other—under the table to the Council of North Braddock and how many other garbage contracts Mr. Long has bought that way.

17. The jury charge on this point reads:

THE COURT: Now, there is a principle of law that says that you may consider like acts or a pattern of activity to prove specific intent. The willful, intentional or deliberate value of the acts charged.

That is, which are not concerned here with—let me put it the other way. We are concerned here with whether or not there were payoffs, kickbacks or bribes. As far as North Braddock is concerned. You may look to any other statements such as Rankin, Munhall, anything of that kind, if you first find that the statements were made.

You may look to them to determine whether there was a pattern of activity to prove the specific intent about which we are talking. We are not concerned in this case with any questions with respect to Munhall or any other place than North Braddock because these questions were solely related at that point and that is solely the charge in this indictment. But, you can look to those other matters to determine whether or not there was a conspiracy to answer the questions as charged in the indictment.

Appendix B.

It is difficult to discern clearly the principle for which the majority contends.¹⁸ The thrust of their comments seems to be that the trial judge need only state that the admitted material is "relevant" in order to comply with Rules 403 and 404. Such a procedure, in my view, is not the one contemplated by the Federal Rules or our cases.

5.

But although I believe that, where the prosecution seeks to introduce potentially prejudicial evidence, Rule 403 and the cases require the trial court to balance probative value against prejudice, the judgment here need not be reversed.

The evidence of guilt in this particular case is so substantial that the legal error may be considered harmless.¹⁹

18. The majority suggests that we are "taking the trial judge to task." To the contrary, the sole purpose of this discussion is to point out the necessity of careful balancing in order to avoid the improper use of other alleged misconduct to obtain a conviction on a charge based on an unrelated transgression.

19. See *Govt. of Virgin Islands v. Toto*, 529 F.2d 278, 283-84 (3d Cir. 1976) (test for harmless error is whether it is highly probable that evidentiary error did not contribute to conviction); Federal Rule of Criminal Procedure 52(a) (harmless error is one that does not affect substantial rights).

Appendix C.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2508

UNITED STATES OF AMERICA

v.

FRANCIS P. LONG, a/k/a "Red"

JOHN HACKETT, a/k/a "Jack"

FRANCIS P. LONG, Appellant

Sur Petition for Rehearing

EN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS,
ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM,
Circuit Judges.

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ARLIN M. ADAMS

Circuit Judge

Dated: September 14, 1978